

**STATE OF MICHIGAN**  
**COURT OF APPEALS**

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COLLEEN K. SCHAFER,

Plaintiff-Appellant,

v

MICHAEL C. NOWICKI and JANE M.  
NOWICKI,

Defendant-Third-Party Plaintiffs-  
Appellees,

v

THE TITLE OFFICE, INC., and  
TRANSAMERICA TITLE INSURANCE  
COMPANY,

Third-Party Defendants-Appellees.

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Before: Wilder, P.J., and Hood and Cavanagh, JJ

PER CURIAM.

This case concerns the interpretation of a restriction contained in a deed describing certain real property in Branch County owned by defendants. Plaintiff instituted this lawsuit in 1994, seeking a declaratory judgment that construed the restriction in such a manner as to preclude defendants from erecting a structure on their property that obstructed plaintiff's view of a nearby lake. The trial court granted summary disposition in favor of defendants. We affirm.

Plaintiff contends that the trial court abused its discretion when it vacated a prior summary disposition order entered in her favor. While we agree with plaintiff that the trial court did not have discretion to vacate the prior order under MCR 2.612(C)(1)(a) or (f), we find that the trial court had discretion to vacate its prior order under MCR 2.604(A).

A motion for relief from judgment under MCR 2.612(C)(1)(a) may be based on mistake, inadvertence, surprise, or excusable neglect of the court. *Altman v Nelson*, 197 Mich App 467, 477-478; 495 NW2d 826 (1992). However, any motion made under subrule (a) must be made

within one year of entry of the final judgment. MCR 2.612(C)(2); *Altman, supra* at 478. Here, the trial court granted plaintiff summary disposition on August 3, 1995 and did not move sua sponte to vacate that judgment until September of 1997, twenty five months later. Thus, we conclude that to the extent the court's motion was made and entered under MCR 2.612(C)(1)(a), the trial court abused its discretion.

The trial court also indicated that its motion was made under MCR 2.612(C)(1)(f). For relief to be granted under MCR 2.612(C)(1)(f), the following requirements must be fulfilled: (1) the reason for setting aside the judgment must not fall within subrules (a)-(e), (2) the substantial rights of the party in whose favor the judgment was originally granted must not be detrimentally affected by the set aside, and (3) extraordinary circumstances must exist which mandate setting aside the judgment to achieve justice. *Heugel v Heugel*, 237 Mich App 471, 478-479; 603 NW2d 121 (1999); *Mikedis v Perfection Heat Treating Co*, 180 Mich App 189, 198; 446 NW2d 648 (1989).

In the instant case, the trial court's only stated reasons for vacating its previous order was its perception that it had made a mistake. Since the trial court did not indicate additional reasons, independent of MCR 2.612(C)(1)(a), we conclude that the trial court abused its discretion under MCR 2.612(C)(1)(f). Nonetheless, we find that the trial court would have been within his discretion to vacate the order under MCR 2.604(A), which states that

[e]xcept as provided in subrule (B), an order or other form of decision adjudicating fewer than all the claims, or the rights and liabilities of fewer than all the parties, does not terminate the action as to any of the claims or parties, and the order is subject to revision before entry of final judgment adjudicating all the claims and the rights and liabilities of all the parties. Such an order or other form of decision is not appealable as of right before entry of final judgment. A party may file an application for leave to appeal from such an order.

In *Mikedis, supra* at 204 n 4, this Court stated that “[a]n order which does not dispose of all the claims of all the parties is not a final judgment, and the trial court was thus free to modify [its] decision at any time before entry of final judgment.” There, discussing the original order which was vacated, this Court noted that the judgment was final only as to two of the counts in the complaint, *id.*, and since the order was not final, the trial court “was empowered to reverse [the] interlocutory order without regard to the time elapsed, simply on the basis of a preference for a more correct adjudication of the rights and liabilities of the litigants.” *Id.* Here, defendants' rights and liabilities had not been fully adjudicated when plaintiff was granted summary disposition. In fact, defendants were denied an appeal of right by this Court on July 8, 1996, because the summary disposition was not a final order. Accordingly, we find that MCR 2.604(A) controls the outcome of this case. Since the trial court reached the right result by concluding it had the authority to vacate the prior order, we will affirm its decision on this issue. See *Cole v West Side Auto Employers Federal Credit Union*, 229 Mich App 639, 641 n 1; 583 NW2d 226 (1998), citing, *General Aviation, Inc v Capital Region Airport Authority (On Remand)*, 224 Mich App 710, 716; 569 NW2d 883 (1997).

Plaintiff also contends that the trial court erred when it interpreted the deed restriction without regard to the recorded affidavit of the drafter, Larry Rathert. We disagree. The restriction states:

This deed is executed subject to the restriction that second parties, their heirs and assigns may not erect a mobile home or trailer on said premises and may not erect any structure on the concrete pad now situated on said premises or between said pad and the South boundary line.

The phrase “between said pad and the south boundary line” is the disputed language in this case.

Restrictive covenants are construed strictly against those claiming the right to enforce them, and all doubts are resolved in favor of the free use of property. *O'Connor v Resort Custom Builders, Inc*, 459 Mich 335, 340; 591 NW2d 216 (1999). If the language in the document is ambiguous, the court must consider the creator’s intention and purpose in creating the restriction. *Webb v Smith (After Second Remand)*, 224 Mich App 203, 212; 568 NW2d 378 (1997); *Rofe v Robinson (On Second Remand)*, 126 Mich App 151, 157; 336 NW2d 778 (1983).

Ambiguity in written instruments can be of two types: patent and latent. *In re McPeak Estate*, 210 Mich App 410, 412; 534 N.W.2d 140 (1995). In *Hall v Equitable Life Assurance Society*, 295 Mich 404, 409; 295 NW 204 (1940), our Supreme Court defined these ambiguities when it stated that

“[a] patent ambiguity is one apparent upon the face of the instrument, arising by reason of inconsistency, obscurity or an inherent uncertainty of the language adopted, such that the effect of the words in the connection used is either to convey no definite meaning or a double one. As opposed to a patent ambiguity, a latent ambiguity is defined as one—‘which arises, not upon the words of the will, deed, or other instrument, as looked at in themselves, but upon those words when applied to the object or to the subject which they describe.’ Black’s Law Dictionary.” [Quoting *Zilwaukee Twp v Railway Co*, 213 Mich 61, 69; 181 NW 37 (1921).]

Because a latent ambiguity is only apparent when viewed in the context of surrounding circumstances, latent ambiguities may be proved by extrinsic evidence. *McCarty v Mercury Metalcraft Co*, 372 Mich 567, 575; 127 NW2d 340 (1964). However, in the instant case, the parties do not dispute the existence or location of the south boundary or the concrete pad. Moreover, there is no dispute concerning whether the restriction applies to parcel D.<sup>1</sup> Therefore, the words of the restriction create no latent ambiguity when applied to the land at issue here.

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<sup>1</sup> Cases involving use of extrinsic evidence are thus distinguishable. In *Webb v Smith (After Remand)*, 204 Mich App 564, 568; 516 NW2d 124 (1994), the language of the restriction was ambiguous and extrinsic evidence was needed to determine whether the term “front lot line,” when applied to the actual lot, meant survey line or beach line. In *Goodwin, Inc v Coe Pontiac*, 392 Mich 195, 197-198; 220 NW2d 664 (1974), the description of land in a contract for sale did not adequately describe the property. Our Supreme Court allowed extrinsic evidence to

(continued...)

In addition, no patent ambiguity exists on the face of the deed regarding this restriction. The language employed in the restriction is to be given its ordinary and generally understood meaning and is not to be subjected to technical refinement. See *Borowski v Welch*, 117 Mich App 712, 716-717; 324 NW2d 144 (1982). The word “between” is defined as “in the space separating.” *Random House Webster’s College Dictionary* (1997), p 126. According “between” its ordinary and popular meaning, we find that the space separating the concrete pad from the south boundary line is bounded by the east and west edges of the concrete pad. Because there is no apparent ambiguity on the face of the restriction, we find no patent ambiguity in the restriction’s language and the trial court correctly interpreted the deed without regard to the affidavit.<sup>2</sup>

Affirmed.

/s/ Kurtis T. Wilder

/s/ Harold Hood

/s/ Mark J. Cavanagh

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(...continued)

determine what land plaintiff owned which fit the description contained in the contract. *Id.* at 198, 204-219. We find that a similar dispute does not exist in this case.

<sup>2</sup> We are not persuaded by plaintiff’s argument that the reasoning applied by this Court in *Webb (After Remand)*, *supra*, 204 Mich App 564, is applicable to this case. *Webb* dealt with and interpreted reciprocal negative easements. Our Supreme Court has stated that reciprocal negative easements arise, “if at all, out of a benefit accorded land retained, by restrictions upon neighboring land sold by a common owner.” *Sanborn v McLean*, 233 Mich 227, 230; 206 NW 496 (1925). The restriction here did not arise out of this situation. Neither LRD, Inc., nor Rathert owned parcel C when the restriction was placed upon parcel D. A reciprocal negative easement benefiting parcel C was therefore impossible to create. Thus, refusal to enforce the restriction here does not work the same hardship upon plaintiff as was the case in *Webb*, because plaintiff herself is not bound by any restrictions on the use of her land.